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IN THE SUPREME COURT OF MISSOURI,
DIVISION NO. 1

No. 39002

THE CURATORS OF THE CENTRAL COLLEGE,
A CORPORATION,
Appellant,

vs.

MARY E. ROSE, COLLECTOR OF REVENUE OF HOWARD COUNTY,
Respondent

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

A

The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal is Section 237 of the Judicial Code, as amended (Section 344 (a), Title 28, United States Code Annotated; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54). Under that statutory provision a review may be had in the Supreme Court of the United States on appeal, as a matter of right, in this case.

The judgment of the Supreme Court of Missouri, Division No. 1, the highest court of the State, appealed from

was rendered on July 3, 1944, and became final on September 5, 1944, on which date appellant's motion for a rehearing, and also its motion to transfer the case to the Supreme Court of Missouri, en banc, were overruled. Said judgment was that the judgment of the trial court, which decreed that plaintiff's bill in equity be dismissed and that defendant go hence without day, be affirmed. The judgment completely disposed of the case and was, therefore, a final judgment. The application for appeal is presented September 22, 1944.

B

The nature of the case is this: Appellant sought to have it adjudged that the lands owned by it are exempt from taxation, and to restrain defendant, as tax collector, from enforcing the collection of taxes assessed against certain of its lands in Howard County.

The legislature of Missouri enacted a public act, which became effective on February 22, 1851 (Laws of Missouri, 1851, p. 64, 65), which is hereinafter referred to as the Act of 1851. The pertinent portion of said Act is as follows:

> "1. That all the land and improvements thereon now owned by the 'William Jewell College' in the counties of Clay, of Grundy, Mercer and Sullivan, and all the lands that may hereafter be granted or devised to said college, or any other institution of learning in this State, for the benefit of education, be, and the same are hereby exempted from all taxes and assessments so long as said lands may be owned by said college."

The Supreme Court of Missouri, in its opinion herein, construed said Act in keeping with appellant's contention, namely, "that the act exempted, from all taxes and assessments, all lands thereafter granted or devised to any institution of learning in the state, so long as such lands were owned by such institution," but held that the act had been later repealed.

At the time said Act was passed, this institution was in operation, although not incorporated. Thereafter it was granted a corporate charter under the name, The Curators of the Central College, by a public act of the legislature, effective March 1, 1855 (Laws of Missouri, 1855, p. 106). The charter provides that the named incorporators, "and their successors in office, are hereby constituted a body politic with all the rights, powers and privileges usually enjoyed by colleges and universities of the highest grade, or which may be necessary and proper to enable them to promote the cause of learning in the state." It was provided in paragraph 7 of said charter (Laws of Missouri, 1855, p. 107) that the power to alter or repeal the same was not reserved in the State.

Appellant asserted, in its petition, "That such charter, including such tax exemption right and privilege, having been accepted and acted upon * * * became and is an inviolable contract between said college and the State" (Record in Mo. Supreme Court, p. 6). Appellant contended that said tax exemption act of 1851 was a part of such contract by reason of the language of the charter, and under the principle that a state statute in existence when a contract is made in the state is deemed to be a part of the contract. Appellant invoked the law, as declared by the Supreme Court of the United States in the case, among many, of *Gulf & G. I. R. Co.* v. *Hewes,* 183 U. S. 66, where the court, speaking of a contract with a state, arising out of a corporate charter, said that, "every such alleged contract is presumed to have been entered into upon the basis and in contemplation of the existing Constitution and statutes."

Defendant's answer asserted that said Act of 1851 "has been superseded or repealed by the provisions of Section 16, Article XI, of the Constitution of Missouri, 1865, Sections 6 and 7, Article X of the State Constitution of 1875, and sections 10936 and 10937 of the Revised Statutes of

Missouri, 1939" (Record in Mo. Supreme Court, p. 8), thereby revoking appellant's tax exemption.

Plaintiff asserted in its reply (Record in Mo. Supreme Court, p. 9) that to uphold and apply any of said laws, as asserted in defendant's answer, would be to impair, through such laws, the obligation of the contract between appellant and the State, in violation of Section 10, Article 1, of the Constitution of the United States, which provides that no state shall pass any law impairing the obligations of contracts.

Section 16, Article XI, of the Constitution of 1865, above referred to, provides that, "No property, real or personal, shall be exempt from taxation except" (certain properties which would not include the lands in question). Section 6, Article X of the Constitution of 1875, provides that certain properties (which would not include the lands in question) "may be exempt from taxation." Section 7 provides that, "All laws exempting property from taxation, other than the property above enumerated, shall be void." Sections 10936 and 10937, Revised Statutes of Missouri, 1939, enacted pursuant to the Constitution of 1875, exempt from taxation the properties enumerated in Section 6, Article X thereof, but not the lands in question.

The decision of the Supreme Court of Missouri was in favor of the validity and potency of said Constitutions and statutes, as effecting the repeal of appellant's tax exemption rights. Said decision was against appellant's contention that said Act of 1851 was embodied in appellant's charter, and against the contention that appellant has a contract with the State, which affords immunity from taxation. The question as to whether appellant has such a contract, said to be impaired, is a Federal question, arising under the Constitution, equally with the question whether the alleged contract has been impaired by the State, and

affords jurisdiction in the Supreme Court of the United States on this appeal.

Yazoo, etc., R. Co. v. *Thomas,* 132 U. S. 174;
Walsh v. *Columbus, etc. Rd. Co.,* 176 U. S. 469.

The Constitutional question herein is a very substantial one. Appellant contends that the tax exemption act of 1851 was an inducement held out by the State for appellant to seek and accept a corporate charter "to promote the cause of learning in the state." The record herein shows that if appellant be required to pay taxes on the lands owned by it in this state it would require an expenditure of about $8,000.00 annually, and that such would materially cripple its ability "to promote the cause of learning in this state," the same being the purpose for which it was chartered by the State.

The cases hereinabove cited, and the following decisions are believed to sustain jurisdiction in the Supreme Court of the United States in this appeal.

Northwestern University v. *Illinois,* 99 U. S. 309, 25 L. Ed. 387;
Yazoo & M. V. R. Co. v. *Thomas,* 132 U. S. 174, 33 L. Ed. 302;
Mackay Tel. & Cable Co. v. *Little Rock,* 205 U. S. 94, 63 L. Ed. 863;
Columbia R. Gas & E. Co. v. *So. Carolina,* 261 U. S. 236, 67 L. Ed. 629.

A copy of the opinion of the Supreme Court of Missouri herein is appended hereto.

Respectfully submitted,

ELLIOTT H. JONES,
Attorney for Appellant.

NOTE:—The Court's opinion has not been published. It will appear in 182 S.W. (2nd)—probably in advance sheets, dated Oct. 17, 1944.

APPENDIX

IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, MAY TERM, 1944

No. 39,002

THE CURATORS OF THE CENTRAL COLLEGE, a Corporation, *Appellant,*

vs.

MARY E. ROSE, Collector of Howard County, *Respondent*

Court's Opinion

Action in equity to declare illegal and void certain real estate taxes assessed against described lands owned by plaintiff in Howard county, to remove the cloud of said assessment of taxes from plaintiff's title and to enjoin defendant from attempting to enforce the collection of such taxes. The trial court found for defendant and entered judgment accordingly. Plaintiff has appealed.

The cause was tried upon an agreed statement of facts. "Central College was incorporated, as an educational institution under the corporate name of 'The Curators of Central College,' by an act of the State Legislature, which went into effect March 1, 1855" (Laws 1855, p. 106). The institution was first established in 1844, but until incorporated, as stated, it operated under the name of Howard High School, unincorporated. The college, since its incorporation, has been continuously operated and has an average annual enrollment of between five hundred and six hundred students. It affords to the general public the usual educational facilities of a college.

The college acquired, and now owns, the described real estate, which was acquired during the period between 1929 and 1932. The lands were granted or devised to the college and are held for the benefit of education. They form a substantial part of the endowment. All taxes, except taxes payable in 1943, have been paid. In 1942, with due formality,

the lands were assessed for taxes payable in 1943. It is agreed that these taxes are valid "if said lands are subject to taxation, that is, unless said lands are exempted from taxation while owned by said college." If the college is required to pay taxes on all lands owned, the annual expenditure for such purpose will be approximately $8000. Defendant is the duly qualified acting collector of Howard county and will proceed to enforce collection of the taxes, unless enjoined.

There is no contention that the described lands are specifically exempt from taxation under Art. 10, Sec. 6 of the present Constitution (1875), under any other provision thereof or under Sec. 10937 R. S. 1939. Appellant contends that said lands are exempt by reason of an Act of 1851, Laws 1851, p. 64, (1) by the force and effect of the Act of 1851 itself, (2) by reason of said Act being "read into" appellant's corporate charter as if set forth therein, or (3) by the "very language of appellant's charter, construed in connection with laws in pari materia therewith," particularly the Act of 1851, supra.

The Act of 1851, supra, was entitled "An Act for the benefit of William Jewell College" and the first paragraph of the Act reads as follows: "That all the land and improvements thereon now owned by the 'William Jewell College' in the counties of Clay, of Grundy, Mercer and Sullivan, and all the lands that may hereafter be granted or devised to said college, *or any other institution of learning in this State, for the benefit of education, be and the same are hereby exempted from all taxes and assessments so long as said lands may be owned by said college.*" (Italics ours). The Act is set out in full in *State ex rel. Waller* v. *Trustees of William Jewell College*, 234 Mo. 299, 311, 136 S. W. 397. The Act was there considered and construed, in connection with a special act of the Legislature, passed in 1849, Laws 1849, p. 232, granting a charter to William Jewell College, and it was held that "when all the surroundings are considered, the public policy of the State considered, these two acts considered, and other acts about the same time considered, it is evidence that there was a legislative intent to relieve the property constituting the endowment fund of

this corporation from the burdens of taxation." (234 Mo. 299, 318).

In the case of Trustees of William Jewell College of Liberty v. Beavers, 351 Mo. 87, 171 S. W. (2d) 604, the Act of 1851, supra, was again considered by the court en banc in connection with the Act of 1849, supra. The holding in the former case (234 Mo. 299) was approved on the theory that the special act of 1849, chartering William Jewell College, and the 1851 Act, exempting property of the college from taxation, were required to be construed together; and that the 1851 Act became a part of the "charter" and, when accepted and acted on, constituted a "contract," which was protected by the Federal Constitution, and the tax exemption in favor of the college could not be impaired by subsequent constitutional provisions and statutes. The reasons for the court's holding are fully stated in the opinion. The court said that, "In these circumstances, it seems reasonable to consider the two acts together as constituting plaintiff's entire charter and its acceptance as such." (171 S. W. (2d) 604, 608).

The pertinent provisions of the Act of 1855, supra, granting a special charter to Central College, are as follows: "J. S. Waddill (and others named) * * * and their successors in office, are hereby constituted a body politic, with all the rights, powers and privileges usually enjoyed by colleges and universities of the highest grade, or which may be necessary and proper to enable them to promote the cause of learning in the state. * * *

"The corporation may acquire and hold property of every description, real and personal, and dispose of the same as it may see fit * * * and to do all other acts necessary or proper to establish and maintain an institution for the instruction of both males and females, in every branch of learning and knowledge. * * *

"The college is established at Fayette, in the county of Howard, in this state, and the style of it is 'The Curators of the Central College.' * * *

"The 6th, 7th, and 18th sections of the first article of the act of this state of 19th March, 1845, respecting corporations, shall not apply to this corporation, and this act shall be deemed a public act, and take effect from its passage."

The 7th section of the Act of 1845, referred to supra, provided that "the charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension, and repeal, in the discretion of the legislature." Rev. St. Mo. 1845, p. 232, Ch. 34, Art. 1, § 7.

The Constitution adopted by this state in 1875 prohibited the granting of tax exemptions by the legislature (Art. 10, § 2); and declared that laws granting exemptions beyond those specifically authorized by it "shall be void" (Art. 10, § 7). This Constitution further provided in Art. 12, §1, that "all existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place, and business been commenced in good faith, at the adoption of this constitution, shall thereafter have no validity." Sec. 1, Schedule of 1875, provided that "all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in force until the first day of July, one thousand eight hundred and seventy-seven, unless sooner amended or repealed by the General Assembly." Appellant does not contend that the part of the Act of 1851, supra, relied upon, was a grant of a special charter or a grant of a special or exclusive privilege to it (since the corporation was not in existence when the act was passed), but considers the same as a general law then exempting from all taxes and assessments the lands granted or devised to institutions of learning in this state.

In view of the conclusions we have reached, we may assume, without deciding, that the part of the Act of 1851, upon which appellant relies (Laws 1851, p. 64) was such a general act; that it was in full force and effect when appellant was chartered; and that the act exempted, from all taxes and assessments, all lands thereafter granted or devised to any institution of learning in the state, so long as such lands were owned by such institution. The issue presented, therefore, is, whether the described lands, acquired by appellant in the years 1929-1932 were exempted from the payment of all taxes and assessments by force and effect of said (1851) act itself? The only authority cited in support of appellant's assignment that "the Act of 1851 (Laws

1851, p. 64) serves to exempt appellant's lands from taxation, even though said act may not be deemed to be a part of appellant's corporate charter," is the case of William Jewell College v. Beavers, supra. Appellant quotes the words, "Therefore, whatever may be the power of the state to repeal plaintiff's tax exemption under the reservation in the general corporation law of 1845, it did not do so by adopting the Constitutions of 1865 and 1875, or by general statutes enacted for the purpose of carrying out the provisions of those Constitutions." (171 S. W. (2d) 604, 609). Appellant says that, "That ruling definitely establishes the proposition that the privilege of tax exemption granted by the Act of 1851 has not been repealed, nor revoked, insofar as it affects institutions of learning that were incorporated and that began operations prior to the adoption of the constitution of 1875." Appellant further emphasizes the fact that there has been no specific legislative enactment, since said date, purporting to repeal the Act of 1851. We think it is apparent from a reading of the opinion in the case of William Jewell College v. Beavers, supra, that the quoted portion of the opinion refers to the act (1) as a part of the charter of William Jewell College and (2) to the rights thereunder vested in said college. But the general part of the Act of 1851, as a general statute, gave no vested rights to appellant. No person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit. Chicago & Alton R. v. Tranbarger, 238 U. S. 67, 76. "Neither corporations nor citizens of a state have any vested rights in its statutes." State v. Mo. Pac. R. Co., 242 Mo. 339, 375, 147 S. W. 118.

Assuming, as we have, that the general reference in the Act of 1851 was a mere general act of the legislature granting tax exemption to institutions of learning for lands granted or devised, it was a mere gratuity or bounty granted by the state, and it could be and was in fact repealed by subsequent statutes and constitutional provisions. Section 16, Art. 11, Constitution of Missouri of 1865; Section 1, Schedule, Constitution 1875; Section 3, 6, and 7, Art. 10, Constitution of Missouri of 1875; Sections 10936 and 10937, R. S. Mo. 1939; Seton Hall College v. South Orange, 242 U. S.

100; Grand Lodge v. New Orleans, 166 U. S. 143, 149. After the adoption of the said constitutional provisions, that part of the Act of 1851, supra, granting immunity from taxation generally (on lands granted or devised to institutions of learning generally) was void, and only that part of said act which constituted a part of the charter of William Jewell College, remained in force. State ex rel. Morgan v. Hemenway, 272 Mo. 187, 198 S. W. 825, 828; The St. Joseph I. R. Co. v. Cudmore, 103 Mo. 634, 15 S. W. 535; The St. Joseph I. R. Co. v. Shambaugh, 106 Mo. 557, 570, 17 S. W. 581; Deal v. Mississippi Co., 107 Mo. 464, 468, 18 S. W. 24. "If a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed." State ex rel. Goldman v. Hiller, (Mo. Sup.), 278 S. W. 708, 709; State ex rel. Dangel v. Hartmann, 339 Mo. 200, 96 S. W. (2d) 329.

Were said lands exempt from taxation by reason of the Act of 1851, supra, being "read into" appellant's charter as fully as if set forth therein? Appellant's theory is that, when the charter was granted to it (Laws 1855, p. 106), the provisions of the Act of 1851 (Laws 1851, p. 64) "became to all intents and purposes, as much an integral part thereof as if it had been written therein in so many words." Appellant cites Watson Seminary v. Pike County Court, 149 Mo. 57, 70, 50 S. W. 880; Scotland Co. v. M. I. & N. R. Co., 65 Mo. 123, 137; and 14 C. J. 117, Sec. 108. Appellant contends that, since the Act of 1851 became a part of its charter or contract, the contract may not be impaired by subsequent constitutional or statutory changes. Sec. 15, Art. 2, Constitution of Missouri (1875); Sec. 10, Art. 1, Constitution of the United States; Washington University v. Baumann, 341 Mo. 708, 108 S. W. (2d) 403; William Jewell College v. Beavers, supra; State ex rel. Morris v. Board of Trustees of Westminster College, 175 Mo. 52, 74 S. W. 990; The Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. Ed. 624.

The rule concerning existing law becoming a part of a contract is well stated in 12 Am. Jur., Contracts, Sec. 240, as follows: "It is commonly said that the existing statutes and the settled law of the land at the time a contract is made become a part of it and must be read into it just as if

an express provision to that effect were inserted therein, except where the contract discloses a contrary intention. This rule is elaborated to the effect that the laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, discharge, and enforcement, enter into, and form a part of, it, as if they were expressly referred to or incorporated in its terms." Swabey v. Boyers, 274 Mo. 332, 203 S. W. 204, 205, and cases cited; State ex rel. and to the Use of Heuring v. Allen, 342 Mo. 81, 112 S. W. (2d) 843, 846; 17 C.J.S. Contracts, Sec. 12c, p. 338.

Appellant concedes that the above rule is limited to "applicable" statutes. The question then is whether that part of the Act of 1851, supra, granting tax exemption generally to institutions of learning in this state on lands granted or devised, was such an applicable statute that it became a part of appellant's charter and, therefore, was not subject to change without an impairment of contract. Somewhat the same argument was made in the case of Chicago & Alton R. v. Tranbarger, supra. In that case an adjoining landowner had obtained a judgment for damages and a penalty of $100 on account of the railroad company's alleged violation of an act of the Missouri Legislature as amended in 1907 requiring "openings across and through the right of way and roadbed" of railroads. The judgment had been affirmed by the Supreme Court of Missouri. Tranbarger v. Chicago & Alton R. Co., 250 Mo. 46, 156 S. W. 694. In the United States Supreme Court it was contended that, at the time the railroad was constructed and afterwards leased to plaintiff in error in perpetuity by virtue of a charter and franchise granted to the Louisiana and Missouri River Railroad Company in the year 1870, Missouri "adhered to the common law rule that surface water was a common enemy, against which every landowner may protect himself as best he can"; that this rule applied to protect railroads as well as other landowners; that such common law rule entered into the contract or charter between the state and the company and into the contracts between the company and the landowners from which it acquired its right of way; and that the immunity from prose-

cution and from private action alike (enjoyed under the existing law at the time of the charter) was in the nature of an appurtenance to the land and such enjoyment could not be impaired by subsequent legislation, without an impairment of contract prohibited by the Federal Constitution. The court said (238 U. S. 67, 76): "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessary intendment imported into the contract. For just as no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit (Munn v. Illinois, 94 U. S. 113, 134; Hurlado v. California, 110 U. S. 516, 532; Buttfield v. Stranahan, 192 U. S. 470, 493; Martin v. Pittsburg &c R. R., 203 U. S. 284, 294), so an immunity from a change of the general rules of law will not ordinarily be implied as an unexpressed term of an express contract. See, Gross v. United States Mortgage Co., 108 U. S. 477, 488; Pennsylvania R. R. v. Miller, 132 U. S. 75, 83."

The Act of 1851, supra, assuming that any part of it was a general act in full force and effect in 1855, and that it granted immunity to all educational institutions in the state from the payment of taxes and assessments on all lands granted or devised to them, yet such act did not affect the validity, construction, discharge or enforcement of the Act of 1855, supra, granting a charter to the particular appellant. The Act of 1855, supra, did not deal with either taxation or institutions of learning in general and no part of the Act of 1851, supra, became a part of such charter in such manner that any subsequent change or repeal of the Act of 1851, supra, would be an impairment of the contract or charter granted by the state to appellant in 1855.

Appellant finally contends the provisions of the charter, to wit, that the named incorporators, "and their successors in office, are hereby constituted a body politic, with all the rights, powers and privileges usually enjoyed by colleges and universities of the highest grade, or which may be necessary and proper to enable them to promote the cause of learning in the state" (Laws 1855, p. 106), when con-

strued with the Act of 1851, supra, grants immunity from the payment of the taxes in question.

The rule relied upon is stated as follows: "'All consistent statutes relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. This is true whether the acts relating to the same subject were passed at different dates, separated by long or short intervals, at the same session or on the same day' (Sutherland, Stat. Construct., Sec. 283). * * * 'Where enactments separately made are read in pari materia, they are treated as having formed, in the minds of the enacting body, parts of a connected whole, though considered by such a body at different dates, and under distinct and varied aspects of the common subject. Such a principle is in harmony with the actual practice of legislative bodies, and is essential to give unity to the laws, and connect them in a symmetrical system. Such statutes are taken together and construed as one system, and the object is to carry into effect the intention. It is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions.' (Ib., Sec. 288)." Sales v. Barber Asphalt Paving Co., 166 Mo. 671, 677, 66 S. W. 979; State ex rel. Columbia National Bank of Kansas City v. Davis, 314 Mo. 373, l. c. 388, 284 S. W. 464; 59 C. J. Sec. 620, p. 1042. Appellant contends that the Act of 1851, supra, must be read in connection with the Act of 1855, supra; that when so read the meaning of the words "rights, powers and privileges" is made clear; and that the exemption of its lands from taxation was a "privilege" necessary and proper to promote the cause of learning in this state. The trouble with appellant's contention is that we are called upon to construe appellant's charter at this date with reference to appellant's contractual immunity from the payment of taxes on the lands in question, which were acquired subsequent to 1929. We have held that the Act of 1851, supra, never became a part of the Act of 1855, supra, and that it has long since been repealed by subsequent constitutional provisions. The Act

of 1851, supra, in so far as applicable generally to institutions of learning in this state, is not in force and effect so that it may be considered under the doctrine of in pari materia in determining the proper construction to place upon the Act of 1855, supra, nor was it in force when the described lands were acquired. In addition, as a repealed statute, it may not be considered in construing the Act of 1855, supra, because the Act of 1855, supra, granting a charter to appellant, does not purport to grant any immunities to appellant (except the immunity from the alteration, suspension or repeal of its charter). The *immunity* from the payment of taxes and assessments, granted by the Act of 1851, supra, to institutions of learning generally, was not mentioned nor included as a part of appellant's charter by the use of the words "rights, powers, and privileges usually enjoyed by colleges and universities." The Act of 1851, supra, is not applicable nor available, therefore, to afford assistance in construing the charter granted appellant.

We hold that immunity from the payment of taxes and assessments on its lands was not granted to appellant by the Act of 1855, supra; that such immunity from payment of taxes on its lands was never included in or became a part of its charter; and that the subsequent changes in the general law, under which such immunity had been granted generally to institutions of learning, was not an impairment of the contract entered into between appellant and this state.

The judgment is affirmed.

S. P. Dalton,
Commissioner.

Bradley, C., concurs.
Van Osdol, C., concurs.

Per Curiam:

The foregoing opinion by Dalton, C., is adopted as the opinion of the Court.

All the Judges concur.

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DEC 26 1944
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 611.

THE CURATORS OF THE CENTRAL COLLEGE,
APPELLANT,
VS.
MARY E. ROSE, COLLECTOR, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

ELLIOTT H. JONES,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 611.

THE CURATORS OF THE CENTRAL COLLEGE, APPELLANT,

VS.

MARY E. ROSE, COLLECTOR, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

Now comes Appellant and respectfully petitions the ourt to set aside the order heretofore entered dismissing he appeal herein for want of a substantial federal question, nd to grant a rehearing, or reconsideration, of that uestion, for the reasons and upon the grounds as follows, o-wit:

1. A meritorious and substantial federal question is ere involved.

2. The decision of the Missouri Supreme Court here- n is manifestly erroneous, as will be pointed out in the uggestions in support of this petition.

3. The case of *Chicago & Alton R. Co.* v. *Tranbarger*, 38 U. S. 67, upon which this court, as well as the Mis-

souri Supreme Court, chiefly relied, is so clearly distinguishable that it should not be deemed to be a pertinent, much less controlling, authority in this case. Such will be demonstrated in the suggestions in support hereof.

4. The chief ground upon which the Missouri Supreme Court held that the Act of 1851, of Missouri, which granted tax exemption to Appellant, should not be deemed a part of Appellant's contract with the State, as evidenced by its corporate charter, is clearly fallacious. Said ground was that, "No person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit." That principle is not one of universal application. It is applicable only where no contract is involved. If, as here, a specifically applicable statute is a part of a contract, for the reason that it subsisted when the contract was made, and the contract was made in view thereof, as was done here, a party to that contract does have the right to insist that such statute remain unchanged, insofar as it affects his contract. It must first be found, on other grounds, that the statute does not form a part of a contract before the broad statement, above quoted, may be applied.

5. The broad statement to the effect that "no person" has a right to insist that a statute remain unchanged, is in direct conflict with the well established principle that, "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms" (*Wood* v. *Lovett*, 313 U. S. 362). If a statute is a part of a contract, the contract may not be impaired by a change, or repeal, of the statute.

6. Counsel for appellant did not interpret the rule of court providing for a "Statement as to Jurisdiction," as

requiring that the case be briefed therein on the merits. He deemed it sufficient to indicate that a genuine federal question was involved, which sufficed to afford jurisdiction in this court. The Appellant is a worthy institution, which for nearly a century has carried a substantial part of the burden of education in this State. It is submitted that ignorance of its counsel should not prevent it from having a decision, on the merits, of this great court upon a proposition that is so vital to its continued operation.

Respectfully submitted,

ELLIOTT H. JONES,
Counsel for Appellant.

Certificate of Counsel.

I, the undersigned, counsel for Appellant herein, do hereby certify that the above petition for rehearing is not made for vexation or delay, but in good faith, and in the belief that the petition is meritorious.

ELLIOTT H. JONES,
Counsel for Appellant.

SUGGESTIONS IN SUPPORT OF PETITION FOR REHEARING.

I.

Appellant Has a Meritorious Case.

Appellant contends that it has a contract with the State of Missouri, for tax exemption. That claim is based, in the main, upon the principle that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms" (*Wood* v. *Lovett*, 313 U. S. 362). That principle is so well known and so firmly established that a further citation of authorities is unnecessary.

When there are noted the circumstances under which Appellant was granted a corporate charter, evidencing a contract, it will appear that no more appropriate occasion could be presented, than is presented here, for the application of the principle above referred to.

Appellant was granted a corporate charter by a public Act, in 1855 (Laws of Missouri, 1855, p. 106). At that time there existed a statute which proffered tax exemption to institutions of learning (Laws of Missouri, 1851, p. 64). That Act was passed to induce the establishment of schools. The Missouri Supreme Court concedes, in its opinion herein, that said Act afforded tax exemption to appellant until it was repealed, as the court holds. See printed opinion, pages 9 and 13, in the "Statement as to Jurisdiction," herein.

It appears from Appellant's corporate charter that very shortly after the passage of said Act of 1851, the two Missouri Conferences of the Methodist Church, South, de-

termined to send delegates to a convention to consider the matter of the support of education by the church. That convention was held in April, 1853, and the delegates thereto, "resolved to unite the means and efforts of their church in the erection of one college of the highest order, at Fayette, Missouri, in this state, and adopted a plan for that purpose, * * * and now desire an act incorporating the proposed institution" (Laws of Missouri, 1855, p. 106).

The fact that such action of the Methodist Church followed so closely upon the passage of the Act of 1851, offering tax exemption to institutions of learning, warrants the presumption that such action of the church was largely, if not entirely, induced by such offer of tax exemption.

By the Act of 1851, the Legislature, with all due authority, made a formal offer to the effect that, if any persons would establish an institution of learning the State agreed that all lands belonging to such institution should be exempt from taxation. The incorporators of Central College formally accepted that offer by incorporating and establishing said college. That offer and the acceptance thereof afford the essential elements of a contract.

The Act of 1855, incorporating Central College, constituted a contract between the corporation and the State.

> *Dartmouth College* v. *Woodward*, 17 U. S. 518.
>
> *Northwestern University* v. *The People*, 99 U. S. 309.

In *Gulf & G. I. R. Co.* v. *Hewes*, 183 U. S. 66, this court, speaking of a contract arising out of a corporate charter, declared that,

> "* * * every such alleged contract is presumed to have been entered into upon the basis and in contemplation of the existing Constitution and statutes."

In the case of *Ennis Water Works* v. *Ennis*, 233 U. S. 652, this court said:

"In other words, that when we come to consider a contract arising out of a state law or ordinance we will treat it as if there was embodied in its text the settled rule of law which existed in the State at the time the state action relied upon as a contract was taken."

So, there is a presumption both of law and of fact that the incorporators of Central College entered into the contractual obligation to establish and maintain that institution "upon the basis and in contemplation of" the tax exemption offered by the Act of 1851.

There can be no question but that the Act of 1851, was enacted as an inducement and as a consideration for the establishment of private schools. The Constitution of 1820, in force at that time, provided, in Article VI, Section 1, that "Schools and the means of education shall forever be encouraged in this state."

In the case of *State ex rel.* v. *William Jewell College,* 234 Mo. 299, the Missouri Supreme Court, in discussing that constitutional provision, in connection with the Act of 1851 here in question, said:

"Prior to the Constitution of 1865 there was no restriction upon the legislative power in the matter of granting exemptions from taxation. The public policy of the State prior to 1865, as evinced by numerous acts incorporating educational institutions and exempting their property from taxation, is clearly apparent. That public policy was to encourage and foster educational institutions. * * * When these several acts were passed the Constitution said to the lawmakers: 'Schools and the means of education shall forever be encouraged in this State.' Encouraged how? Not by the simple permissive act of giving them a mere license to exist. The State was interested in schools and the constitutional idea was to foster and aid them in such manner as could be done. A few lines from

> *State* v. *Fisk, supra,* are appropriate here: 'How can it be contended that it is the policy of the State to encourage education, and to levy direct taxes upon its citizens for the purpose of furnishing education free, and at the same time refuse exemption to the property of educational institutions which conduce to cheapen education, and place the higher branches thereof within reach of those who would otherwise be a direct tax upon the people of the State if they were to leave such institutions as this of the defendant, and resort to the public schools.' "

In connection with the proposition that it was the public policy of the State when Central College was chartered in 1885, to promote, by tax exemption, the cause of education in the State, it should be noted that it is provided in the Central College charter that the incorporaters, "and their successors in office, are hereby constituted a body politic, with all the rights, powers and privileges usually enjoyed by colleges and universities of the highest grade, or which may be necessary and proper to enable them to promote the cause of learning in the state" (Laws of Missouri, 1855, p. 106).

The incorporators were to have not only the rights, powers and privileges usually enjoyed by colleges, but were to have, in addition, all the rights, powers and privileges, "which may be necessary and proper to enable them to promote the cause of learning in the state." Some meaning and some import must be given to that language. By the Act of 1851 the Legislature had declared that tax exemption was a right and privilege necessary and proper to promote the cause of learning. That Act, *in pari materia* with the charter act, serves to define and make definite the general language of the charter act. Herein we find an additional reason for the application here of the principle that a statute in existence when a

contract is made is read into and becomes a part of the contract.

This case was submitted upon an agreed statement of facts, which is found in the record on file with the clerk. It was agreed, "That said college has always been operated as an eleemosynary institution for the general benefit and not for the purpose of any private gain to any person. That all of its assets have been accumulated by virtue of gifts made to it for the benefit of education."

In the case of *State ex rel.* v. *William Jewell College*, 234 Mo. 299, the Missouri Supreme Court declared, with much emphasis, that a tax exemption privilege should be construed and applied liberally, and not strictly, in favor of such an institution, for the reason that it carries a substantial part of the burden of education which rests, primarily, upon the State. It performs a public function.

In the case of *Washington University* v. *Gorman*, 348 Mo. 310, it was held that relieving the State, to some extent, of the burden of higher education was a good consideration for a contract for tax exemption.

The Missouri Supreme Court held that the Act of 1851 had been repealed by a later adopted Constitution and that Appellant's right to tax exemption had thereby been annulled. Central College has, for nearly a century, faithfully performed the contractual obligation to maintain an institution of learning, which it entered into upon the faith and in consideration of the tax exemption vouchsafed by the Act of 1851. The question at issue here is, may the State withdraw the consideration that induced the contract and maintain that the contract has not been thereby impaired? As was said by Mr. Justice Roberts, for the court, in *Wood* v. *Lovett*, 313 U. S. 362:

> "As in the cases cited, so here, the question is whether the State granted a valuable right which it subsequently essayed to take away."

In the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, it was said:

> "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation."

If the decision of the State court is manifestly right, it will, of course, be accepted. But, if there is a fairly debatable question appellant is entitled to have the independent judgment of this court thereon. We will endeavor to show that the decision herein of the Missouri Supreme Court is manifestly erroneous. It will certainly be made to appear that the correctness of that decision is fairly debatable.

II.

The State Court Opinion Considered.

The reasons assigned by the Missouri Supreme Court for refusing to apply here the well established principle that a statute in existence when and where a contract is made becomes a part of the contract, are wholly untenable. The court notes that said principle is recognized in Missouri. There is cited the case of *Swabey* v. *Boyers*, 274 Mo. 332, 203 S. W. 204, wherein the court said:

> "It is true, as respondent asserts, that laws in force at the time and place of making the contract which affect its validity, performance, discharge, or enforcement enter into and form a part of it as if they were expressly referred to or incorporated within the terms of the contract (6 R. C. L., Contracts, Sec. 243; *Christian* v. *Insurance Co.*, 143 Mo. 460, l. c. 465; *State ex*

rel. v. *Smith*, 173 Mo. 398, l. c. 420; *Havens* v. *Fire Ins. Co.*, 123 Mo. 403, l. c. 416-17; *Kleeman Co.* v. *Casualty Co.*, 177 Mo. App. 397; *Northern Pacific Ry. Co.* v. *Wall*, 241 U. S. 87, l. c. 91; *Walker* v. *Whitehead*, 16 Wall. l. c. 317). This rule is made to apply, it seems, to every kind of contract which is the subject of statutory enactment."

The court assigned but two reasons for refusing to apply that principle here. The first was that the part of the Act of 1851, which was applicable to Appellant, was but a general rule of law, and that, "No person has any vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit," to quote from the opinion.

If that principle, as broadly stated, is correct, and may be given universal application, then the many decisions of this court are all wrong, which declare that a statute in effect when a contract is made becomes such a part of the contract that a party thereto may insist that the statute be not changed, insofar as his contract is concerned. Obviously, if a statute is a part of a contract, it is no more permissible to impair that part of the contract, by a change in the statute, than it is permissible to impair any other part of the contract. In numerous cases this court has held that a general statute which formed a part of a contract, because the statute existed when the contract was made, could not be changed to the detriment of the contract. *Wood* v. *Lovett*, 313 U. S. 362, is an example.

The broad statement that, "no person" has a right to insist that a statute remain unchanged, is clearly fallacious. If the statute be a part of a contract then a party to the contract does have such right. If there be no contract involved the principle may apply, but if a contract is involved the principle does not apply. Therefore, before it can properly be stated that a certain person has no right to insist that a

certain statute remain unchanged, it must first be found that the person has no contractual right in that statute. Obviously, to apply such statement to show that said statute is not a part of said person's contract is to beg the question. The principle applies only after it has been found, by other tests, that no contract is involved.

The Missouri Supreme Court did not, before applying the broad statement above quoted, undertake to show that the Act of 1851 did not form a part of Appellant's contract with the State. It erroneously undertook to use the fallaciously broad statement to show that no contract existed. It had to assume, erroneously, the non-existence of a contract in order to apply said broad statement.

The cases in which language is used to the effect that, "No person has any vested right in a general rule of law entitling him to insist that it remain unchanged for his benefit," are, in the main, cases in which no alleged contract was involved. In some of the cases wherein it is said that statutory law is subject to change at the will of the Legislature, the court is careful to add, "unless prevented by constitutional limitations" (*Munn* v. *Illinois*, 94 U. S. 113). If the statement is made in a case where a contract was involved, either (a) the contract was one that was subject to alteration, or repeal, by the Legislature, or (b) the subsequent statute, which changed the law, was enacted by virtue of the police power of the state. Of course, if the contract is one that may be altered by the legislature, any statute which forms a part of the contract may be altered. And, indubitably, every contract is made with the knowledge that it may be lawfully affected by proper police regulations. But we are concerned here with a contract, to-wit, Appellant's charter, which was declared to be unalterable (Laws of Missouri, 1855, p. 107, Par. 5). And there is no claim that the Act of 1851 was altered, or repealed by virtue of any police regulation.

The Missouri Supreme Court relies, on this point, upon but two cases, viz., *State* v. *Mo. P. R. Co.*, 242 Mo. 339, and *Chicago & A. Ry. Co.* v. *Tranbarger*, 238 U. S. 67. In the first case the court was considering a statute which required all corporations to make semi-monthly payments of wages to employees. The statute was upheld as a proper police regulation. In the Opinion the court said:

> "Whether the Legislature of Missouri has reserved the power to amend charters of corporations is a point which we do not deem necessary to decide in this case. We can safely uphold the constitutionality of the semi-monthly payment law under the general police power of the State. This power, as we have heretofore decided, was announced and fully preserved in Section 2 of Article XIII, Constitution of 1820, and at no time since that date has it been suspended or placed in abeyance."

That case is not an applicable authority here.

In the *Tranbarger case, supra*, it appeared that Missouri had adopted the Common Law, and, therefore the common law rule regarding surface water. The State granted a corporate charter to a railroad company, and it was contended that the common law rule as to surface water became a part of its contract with the State, evidenced by its charter, and that a statute which changed that common law rule, as to railroads, impaired its contract. This court questioned whether a mere common law principle, in existence long before railroads were even thought of, and which was never made especially applicable to railroads, and which did not materially affect the construction or operation of a railroad, could be deemed to have been within the contemplation of the parties to the contract evidenced by the corporate charter. After discussing that proposition the court said:

"But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the state for the general benefit of preventing unnecessary and widespread injury to plaintiff. It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the state to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community."

It will thus be seen that the case was really decided upon the proposition that the Constitution does not protect a contract from impairment by a proper police regulation. There was there involved no *statute* which was claimed to be a part of the railroad company's charter, and, particularly, no statute which was distinctly and especially applicable to railroads. In the opinion the court said: "The previous immunity from responsibility for such injury was nothing more than a general rule of law, which was not in terms or by necessity intendment imported into the contract."

In contrast, note that in the case at bar we are considering a statute which was especially applicable to educational institutions, a statute that was an inducement for the acceptance of a charter for such an institution, a statute that materially affected the performance of appellant's obligation to maintain Central College.

In the *Tranbarger case, supra,* this court first found that, for the reasons stated in the opinion, the common law rule as to surface water did not enter into the railroad company's contract. It then, and on that account, applied the principle that it could not be insisted that the rule remain unchanged. The court did not invoke that principle

to indicate that there was not a contract, as did the Missouri court here. We submit that the Tranbarger case is so clearly distinguishable that it may not be considered as a pertinent authority here.

The only other reason assigned by the Missouri Supreme Court for refusing to apply here the principle that a statute in existence when a contract is made becomes a part of the contract, was that the Act of 1851 "did not affect the validity, construction, discharge or enforcement of the Act of 1855, *supra*, granting a charter to the particular appellant." See opinion of the court, page 13 of printed "Statement as to Jurisdiction," herein.

It is impossible to understand how the court could say that the Act of 1851 did not affect the "construction" of Appellant's charter, in view of the court's recognition of the principle that a contract must be construed in the light of the law existing when the contract was made. It is even more impossible to understand how the court could say that tax immunity afforded by the Act of 1851 did not affect the "discharge," that is, the performance of Appellant's contract, which was evidenced by its charter. Appellant's contractual obligation was to establish and maintain a "college of the highest order."

It appears, in the agreed statement of facts herein, that if Central College be required to pay the usual taxes on all the lands owned by it in the various counties of the state, the same would require an annual expenditure of about $8,000. That sum equals the annual income on about $250,000 of the college endowment, or the tuition fees paid by about fifty students. It equals the salaries of two full professors, or the salaries of several instructors. It can not be said, with any semblance of correctness, that the Act of 1851, that is, tax immunity does not "affect" Appellant's obligation to operate Central College. Tax immunity does,

indubitably, affect the performance of Appellant's contract. In the case of *Southern Surety Co.* v. *Oklahoma*, 241 U. S. 582, among many, this court said that,

> "The law existing when a contract is made, and affecting its performance, becomes a part of it."

No principle is more thoroughly settled or firmly established.

We believe that we have shown that the decision of the Missouri Supreme Court to the effect that Appellant does not have a contract with the State for tax immunity, is manifestly erroneous, since we have shown that the reasons assigned for such holding are erroneous. At the very least, such is a fairly debatable proposition. Whether or not Appellant has a contract for tax immunity is a substantial federal question, and suffices to afford jurisdiction in this court on this appeal.

Northwestern University v. *The People*, 99 U. S. 309.

We submit, therefore, that the order heretofore made herein dismissing the appeal for want of a substantial federal question, should be set aside, and that this cause should be reinstated on the docket for hearing on the merits.

Respectfully submitted

ELLIOTT H. JONES,
Counsel for Appellant.

No. 611. CURATORS OF THE CENTRAL COLLEGE *v.* ROSE, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Missouri. December 4, 1944. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Chicago & Alton R. Co.* v. *Tranbarger*, 238 U. S. 67, 76; *Phelps* v. *Board of Education*, 300 U. S. 319, 322–23; *Keefe* v. *Clark*, 322 U. S. 393, 396. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. *Mr. Elliott H. Jones* for appellant. Reported below: 182 S. W. 2d 145.